No. 81 5128

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

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SUPREME COURT, U.S.

RALPH GRELLA,

Petitioner,

-v.-

UNITED STATES OF AMERICA

APPLICATION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT.

Petitioner, Ralph Grella, respectfully seeks leave to proceed here *in forma pauperis*, without payment of fees and costs.

Counsel certifies that, in the lower court proceedings in this case, the petitioner was represented by counsel associated with The Legal Aid Society, Federal Defender Services Unit, appointed by the court pursuant to the Criminal Justice Act.

New York, New York
July 24, 1981

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Attorneys for the Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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No. 80-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

RALPH GRELLA,*

Petitioner,

-*v.*-

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

QUESTION PRESENTED

Whether the trial court's failure to afford defense counsel a timely opportunity to see a note from the jury during deliberations and suggest responses to the jurors' inquiry mandates reversal.

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*Alberto Cora and Robert Miller were parites on the appeal below but are not parties to this petition.

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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT.

Petitioner, Ralph Grella, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit which affirmed a judgment of the United States District Court for the Southern District of New York, convicting petitioner of conspiracy to distribute heroin (21 U.S.C. §846) and three counts of unlawful distribution of heroin (21 U.S.C. §§812, 841(a)(1), 841(b)(1)(A) and 18 U.S.C. §2).

OPINION BELOW

The judgment of the Court of Appeals was rendered on April 8, 1981 and the summary opinion is annexed as Appendix A.

JURISDICTION

The judgment of the Court of Appeals was entered on April 8, 1981; a copy of the judgment is annexed as Appendix A.

On May 27, 1981, the Court of Appeals denied petitioner's timely application for rehearing and rehearing en banc. A copy of the order denying rehearing and rehearing en banc is annexed as Appendix B.

No application has been filed for an extension of time within which to file this petition.

The Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

Petitioner Ralph Grella was indicted, along with Mitchell Engelson, Robert Miller, Alberto Cora, and Manuel Medina, on a charge of conspiring between March 12, 1980 and July 30, 1980, to distribute heroin (count one) and with unlawful distribution of heroin on March 20, 1980 (count three), on April 9, 1980 (count four) and on July 3, 1980 (count five).

The Prosecution's Case

DEA Agent Julio Mercado testified that from March until

July 1980 he posed as a prospective purchaser of heroin (T.1-3, 8-12).* During this period, the agent purchased heroin on four occasions from Mitchell Engelson (T.24-27, 55-63, 68-73, 102-103). Manuel Medina was present at several transactions and Robert Miller was observed by surveillance agents assisting Engelson (T.24-27, 55-63, 253-255).

The evidence against petitioner Grella was as follows: On March 20, 1980, after a transaction had occurred outside of petitioner's presence, Miller and Engelson were observed speaking to petitioner Grella (T.257-258). Petitioner asked what took the two so long and left five minutes later (T.336-339). Despite the abundance of testimony concerning the others, there was no evidence concerning petitioner between March 20, 1980 and July 2, 1980, when Engelson referred to "Horse" as a connection and allegedly made a phone call to him (T.94). On July 3, 1980, Engelson introduced petitioner Grella to the agent as his connection, "Horse" (T.98). Petitioner said that he could provide a commitment on a large purchase of heroin (T.99-101). Engelson did not sell the agent an ounce of heroin until after petitioner had left (T.102-103).

The Defense

Petitioner Ralph Grella testified that Engelson had asked him to pose as a narcotics connection so that they could "rip-off" a prospective purchaser. Petitioner had no knowledge that Engelson had actually engaged in sales of heroin (T.642-651).**

The Charge and Deliberations

Following the court's charge, the jury began its deliberations at 3:45 p.m. on October 16, 1980. In response to the jury's note requesting a second charge on the meaning of conspiracy,*** the jury was brought back to the courtroom (T.934-

---

*"T" refers to the transcript of trial.

**Petitioner had made a post-arrest statement consistent with his defense at trial. However, the court refused to allow this statement in evidence.

***The attorneys were informed of the contents of this note and did not object to a rereading of the initial conspiracy instruction.

939). At 5:55 p.m., the jurors sent a note requesting various evidence in the case (T.939). At 6:15 p.m. the jurors were dismissed until 9:30 the next morning (T.942-943). At 9:55 a.m. the jurors were given the evidence they had requested the prior evening (T.947-949).

At 11:00 a.m. a note was received and the jury returned to the courtroom at 11:25 a.m. The defense attorneys were not told of the contents of the note or given the opportunity to suggest a response. The trial judge stated in open court:

> THE COURT: I have your note, "The jury respectfully requests the definition of a conspiracy."
>
> The statute provides that if two or more persons conspire to commit any offense against the United States and one or more such persons do any act to effect the object of the conspiracy, they are guilty of the crime of violating the conspiracy statute.
>
> I will define it for you further, and simply, without all the other additional things I told you before and maybe this will be helpful to you.
>
> A conspiracy is a combination or agreement of two or more persons to join together to attempt to accomplish some unlawful purpose. It is a kind of partnership in criminal purposes in which each member becomes the agent of every other member.
>
> The gist, or essence, of the offense is a combination or mutual agreement by two or more persons to disobey or disregard the law.
>
> The evidence in the case need not show that the alleged members of the conspiracy entered into any express or formal agreement or that they directly stated between themselves the details of the scheme and its object or purpose or the precise means by which the object or purpose was to be accomplished.
>
> Similarly, the evidence in the case need not establish that all of the means or methods set forth in the indictment were in fact agreed upon to carry out the alleged conspiracy or that all of the means or methods which were agreed upon were actually used or put into operation. Neither must it be proved that all the persons charged had been members of the conspiracy, as such, or that the alleged conspirators actually succeeded in accomplishing their unlawful objectives. What the evidence in the case must show beyond a reasonable doubt is that two or more persons in some way or manner positively or tacitly came to a mutual understanding to try to accomplish a common and unlawful plan as charged in the indictment, and here to distribute heroin, that the defendant you are considering wilfully became a member of such conspiracy and that one of the conspirators during the existence of the conspiracy knowingly committed at least one of the overt acts described in the indictment, that such overt act was knowingly committed at or about the time alleged in an effort to accomplish some object or purpose of the conspiracy, and that at least one of the overt acts was committed in the Southern District of New York.
>
> An overt act is any transaction or event, even one

> which may be entirely innocent when considered alone, but which is normally knowingly committed by a conspirator in an effort to accomplish some object of the conspiracy.
>
> One may become a member of the conspiracy without full knowledge of all the details of the unlawful scheme, or the names and identities of all the alleged conspirators.
>
> So if a defendant with an understanding of the unlawful character of a plan knowingly and wilfully joins in an unlawful scheme on one occasion, that is sufficient to convict him of conspiracy even though he had not participated at earlier stages in the scheme and even though he played only a small, or minor, part in the conspiracy.
>
> I believe that responds to your request, does it not? All right, you may retire.
>
> (T.950-952).

When the jurors left the courtroom, the defense attorneys objected to the fact that the court had not read the jurors' note or discussed the matter with counsel before giving the charge. All three defense lawyers pointed out inadequacies in the court's response to the jury request:

> MR. COHEN [Grella's counsel]: I had no idea before your Honor read the note to the jury what the question was --
>
> THE COURT: What difference does it make?
>
> MR. COHEN: Your Honor, most respectfully, I try not to interrupt you and if you just let me say something, maybe it will be faster. I understood the procedure in the court was to let counsel know. I am very unhappy with what you read and it is the third time you read it in the space of three and a half hours of deliberation and it is clear they don't understand that, and after hearing it three times I am not sure I do.
>
> You went into a lot of things that are not the definition of conspiracy, but you don't have to know all the parties, mere knowledge is not enough, and mere knowledge that a crime is going to take place, without anything else, doesn't plug one into a conspiracy.
>
> The definition of wilfullness has troubled me from the first time you read it yesterday, and as I understand the definition of conspiracy, you have to have an intent to violate some criminal statute, as well as the agreement with someone else to do so.
>
> I don't think that has ever been made clear to this jury and I respectfully request the Court instruct the jury on the definition of wilfullness so that they can more fully -- not more fully, but so that they can understand the concept of conspiracy.
>
> MR. OWENS [Prosecutor]: I think your Honor did give a definition of wilfullness and --
>
> THE COURT: My thought is that I didn't read a lot of other things about conspiracy because I think the jury requested a definition of conspiracy, and that

is the definition of conspiracy, without putting all the attendant things in about overt acts, and I read it simply this time -- all right, you have your exception.

MR. STONE [Miller's attorney]: I would like to join in the exception of Mr. Cohen. I would like to make a separate objection of my own. I understand that this is the third time the jury has asked --

THE COURT: The second time.

MR. STONE: This reading was different, your Honor. We were not informed before the jury came in what the question was and we did not have an opportunity to tell your Honor what we would like in the charge to the jury at this time. There was no charge that mere presence doesn't make a person a member of a conspiracy [*] necessarily, and I am a little dissatisfied with the definition of the overt act required to make one a member of the conspiracy, especially in the absence of the mere presence charge, and I also join with Mr. Cohen in the fact that wilfullness was not described and was not demarcated for the jury in this case.

(T.953-955)

The court refused to modify or supplement its response to the jurors' note and instead accused the defense lawyers of bad faith in raising objections to the procedure and charge:

THE COURT: With respect to the other objections, I believe that under the circumstances where I have given twice the full-blown definition of -- the description of the entire aspects of a conspiracy, this note, and I don't believe you would have done anything differently if I told you about it before I came on the bench, and the note reads, "The jury respectfully requests the definition of a conspiracy," and I believe that I have complied with their request and when I asked them about it, there was not a single one that nodded in the negative, and all that I saw nodded in the affirmative, that that was what they wanted to hear.

MR. COHEN: Your honor may not have done anything differently, but I definitely would have. I am concerned about the definition of "wilfulness," and I have been bothered by that since it came out the first time.

THE COURT: All right. You all remain here.

MR. COHEN: Judge --

(T.956)

Moments later, at 11:40 a.m., the jury returned with a verdict finding the three defendants guilty of all counts (T.957-958).

---

*Cora's attorney also asked the court to add a mere presence charge (T.953).

REASONS FOR GRANTING THE WRIT

The jury experienced difficulty in reaching a verdict and on two separate occasions asked for the meaning of conspiracy as it applied to the instant case. On the second, critical occasion the court called the jury to the courtroom and read the first three pages of the five page charge it had previously given in answer to the same question. The shortened charge was unbalanced and omitted crucial language favorable to the defense. The defense attorneys were not informed of the contents of the note or given the opportunity to suggest an answer. They objected both to the procedure and the substance of the instruction. Though the impropriety of the court's treatment of the jurors' inquiry was squarely raised in the briefs and oral argument, the panel's summary affirmance makes no mention of the issue. The trial court's supplemental charge was improper in procedure and was severely prejudicial to the defense.

The procedure followed by the trial court violated the long-standing rule regarding supplemental jury instructions in federal criminal trials:

> The interchange between jury and judge should be surrounded with formalities so that the Defendant has an adequate opportunity to evaluate the propriety of the proposed response or instruction, formulate objections, or suggest a different response. United States v. Schor, 418 F.2d 26, 30 (2d Cir. 1969); United States v. McDuffie, 542 F.2d 236, 240-241 (5th Cir. 1976); Rogers v. United States, 422 U.S. 35, 39-40, 95 S.Ct 2091, 45 L.Ed.2d 1 (1975).
>
> United States v. Artus, 591 F.2d 526, 528 (9th Cir. 1979)

Recently, the Second Circuit has reasserted the principle that defense attorneys should be afforded the opportunity to suggest appropriate responses to questions from the jury before the court responds to the inquiry. United States v. Ronder, 639 F.2d 931, 934 (2d Cir. 1981).

The trial judge in the instant case did not follow this procedure. In fact, when the defense attorneys protested the procedure and contents of the supplemental instruction, the

judge not only refused to modify the instruction but criticized the attorneys. As the Second Circuit observed in Ronder, supra, 639 F.2d at 935, if the court had followed the appropriate procedure and discussed the jurors' inquiry with the attorneys he might have given a charge that was more equitable to the defendants. For example, the judge might have supplemented the instruction with a definition of wilfullness, which two of the attorneys requested. He might have repeated the "mere presence" charge, which was also requested and which had had previously given in answer to the same question by the jurors. The court also omitted the instruction that he had given earlier that "a person who has no knowledge of the conspiracy but who acts in a way which advances some object or purpose of the conspiracy does not, thereby, become a conspirator" (T.936). In sum, the court's last instruction on conspiracy was unbalanced and concentrated more on what the prosecution did not have to prove to establish guilt than what it did have to prove.

By defining conspiracy "simply, without all the other additional things I told you before" (T.950), the trial court obviously made the issues simple for the jurors, who nodded their heads in agreement (T.956) and within minutes of the supplemental instruction found the three defendants guilty of all counts. Because the proof against petitioner Grella was not strong and because an understanding of conspiracy was vital to the jury's consideration of all the counts against petitioner (whose participation in the substantive counts was submitted on a Pinkerton theory (T.784, 791, 813, 909-910)), it cannot be said "with fair assurance" (United States v. Schor, supra, 418 F.2d at 30) that the error in handling the jury's inquiry did not effect the verdict.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue.

Respectfully submitted,

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New York, New York

July 24, 1981.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

UNITED STATES COURT OF APPEALS
APR 8 1981
SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
For the Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 8th day of April, One Thousand Nine Hundred and Eighty-one.

80-1476
80-1477
80-1478

PRESENT:

HON. WALTER R. MANSFIELD, Circuit Judge
HON. J. EDWARD LUMBARD, Circuit Judge
HON. ELLSWORTH A. VAN GRAAFEILAND, Circuit Judge

- - - - - - - - - - - - - - - - - - - -x

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v. ORDER

ALBERTO CORA, RALPH GRELLA,
and ROBERT MILLER,

Defendants-Appellants.

- - - - - - - - - - - - - - - - - - - -x

Appeal from judgments of conviction entered in the United States District Court for the Southern District of New York.

Appellants were convicted of conspiracy to violate the federal narcotics laws (21 U.S.C. § 846) and of distributing and possessing with intent to distribute heroin (21 U.S.C. §§ 2, 812, 841 (a)(1), 841(b)(1)(A)). We affirm.

Appellant Cora contends that his post-arrest statements which indicated his willingness to cooperate with Drug Enforcement Administration officers should have been suppressed. At the time of Cora's arrest, DEA agents asked Mrs. Cora not to tell anyone that he was arrested. However, the agents also informed her that Mr. Cora was being arrested for violating the federal narcotics laws. Moreover, Cora was twice given complete Miranda warnings. Nevertheless, he argues on appeal that he was denied his right to counsel. The district court concluded that in the context of the

arrest, the admonition not to tell anyone else was directed to others involved in the drug sales and was not to be construed as a prohibition against contacting an attorney. We hold that the district court's finding in this respect was not clearly erroneous. United States v. Friedman, 558 F.2d 1125, 1127 (2d Cir. 1977).

Appellant Grella argues for reversal because he was denied a fair trial on two separate grounds. First, he contends that the district court erred in excluding his post-arrest statement that he believed that he was engaged in a "rip-off" and not an actual narcotics transaction. Second, he argues that the prosecution's summation was improper because it alluded to evidence not present in the record and because it was inflammatory.

Grella's defense was predicated on his claim that he had never intended to sell any drugs but rather had intended to "rip off" prospective drug buyers. At trial, defense counsel had attempted to elicit from Grella his post-arrest statement to this effect. Counsel argued that the prosecution had suggested that the "rip-off" theory had been concocted during trial, and as an allegation of recent fabrication, he had a right to introduce the post-arrest statement under Federal Rule of Evidence 801(d)(1)(B). In order to introduce a prior consistent statement under this rule, however, the proponent must show (1) that the prior statement is consistent with the in-court testimony, (2) that it is being offered to rebut an express or implied charge of recent fabrication or improper influence or motive, and (3) that the prior consistent statement was made prior to the time that the supposed motive to falsify arose. United States v. Quinto, 582 F.2d 224, 233-34 (2d Cir. 1978). Here, we do not see how the prosecutor's

comments could fairly be construed as an allegation of recent fabrication. More importantly, there was no showing that the statement was made prior to the time when the motive to fabricate arose. The district court committed no error in excluding the statement. Moreover, we hold that there were no improprieties in the prosecution's summation.

Finally, with respect to appellant Miller, we find no error on the part of the district court.

Accordingly, the judgment of the district court is affirmed.

Hon. Walter R. Mansfield

Hon. J. Edward Lumbard

Hon. Ellsworth A. Van Graafeiland

FILED
MAY 27 1981
A. DANIEL FUSARO, CLERK
UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

80-1476
80-1477
80-1478

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 27th day of May , one thousand nine hundred and eighty-one.

- -x

UNITED STATES OF AMERICA

Plaintiff-Appellee

-v-

No. 80-1476
80-1477
80-1478

MITCHELL ENGELSON, a/k/a 'Buddy',
ROBERT MILLER, a/k/a 'Bobby',
RALPH GRELLA, a/k/a 'Horse',
MANUEL MEDINA, a/k/a 'Blackie',
ALBERTO CORA, a/k/a 'Bucky',

Defendants

ROBERT MILLER, a/k/a 'Bobby',
RALPH GRELLA, a/k/a 'Horse',
ALBERTO CORA, a/k/a 'Bucky'

Defendants-Appellants

- -x

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellant, Ralph Grella.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro
A. Daniel Fusaro
Clerk
by Francis X. Gindhart
Chief Deputy, Clerk